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THE CONSTITUTION,
ITS ORIGIN, FUNCTION, AND AUTHORITY.

A

LECTURE

INTRODUCTORY TO

THE SUBJECT OF CONSTITUTIONAL LAW,

DELIVERED BEFORE THE

LAW SCHOOL OF HARVARD UNIVERSITY.

BY

THEOPHILUS PARSONS,

DANE PROFESSOR OF LAW.

MARCH 7, 1861.

Published by request of the Students.

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LECTURE.

LET me introduce what I shall have to say of the constitutional law of this country, by some remarks on the Origin, the Function, and the Authority of a Constitution.

The phrase which I have already used, "constitutional law," if it be employed out of this country, must have but an uncertain and unreal meaning. For there is no such thing elsewhere as a Constitution in any just and accurate sense of that term. A Constitution is, in fact, an American invention. It was prepared for by a long course of antecedents, all of which pointed towards this result, and made it possible. And it came into being precisely because it was, and when it was, most urgently demanded. If its whole value was not known by them who first framed it, and helped it into active existence, nor by the generation which it lifted out of fear and sadness and depression into a prosperity that nothing on earth has surpassed, nor in later ages, when

it has made us the world's wonder and the world's hope, it is, in this respect, only like many other of the greatest gifts of Providence,—so great in its worth and its beneficence that these cannot be appreciated, until age after age has developed its capacity of blessing.

A few centuries ago, four great discoveries, or rather the bringing within reach and use of four things known but neglected before, came near together and distinguished that period from any other in history. One of these was the mariner's compass ; and it guided Columbus to America, which was another. Gunpowder, the third, made the subjection of this continent easy and rapid. And the press, which was the fourth discovery, diffused among expecting nations the tidings of this new world, and spread widely a knowledge of the advantages which it offered ; and this soon brought to our shores the germs of a new population. This grew up under the fostering and needed care of the parent races, until the colony was strong enough to become a State.

Something like this had often happened before. History is full of stories of successful colonization, and of young nations which cast off dependence when they were strong enough to break their fetters. But something else happened now that never occurred before. In all previous instances where colonies grew into States, they became substantially what their parents were. When the new shoot was rooted, it was the old tree

again, with more or less unimportant change from soil or climate or position. Not so here. Our colonies cast off allegiance to a king. Our colonial fathers were all subjects of a king, as all the inhabitants of earth, with few and slight exceptions, under some form or name, were and always had been. But when our fathers ceased to be subjects of their king, they founded States without a king ; and in this simple fact they indicated, and the wiser among them saw, the dawn of a new day in the life of man.

The instrument by which this work was done, was as new as the work itself. It was a Constitution. Of the four great discoveries to which I have alluded, it would probably be admitted, both abroad and at home, that the giving of America to the old world was the most important in its effect upon the future condition of mankind. Nor would it be denied that the others aided either in the discovery of America, or in bringing this discovery into use. I am not prepared to say that the whole series culminated in the introduction of constitutional government in a new world, where it might be developed into its full growth in freedom from clinging traditions and overmastering habits. We do not yet know enough of the working of this new political instrument to justify so large an assertion. But I think that I see in it a significant indication that a great change in human affairs is impending ; and a fact which must have great influence in making that change an improvement. And you must be patient with me while

I tell you what I think a Constitution is, and what is due from us to our Constitution, and what is due from our Constitution to us, before I can hope that you will think me less than extravagant, in what I have already said, and when I again declare that I regard this American invention, this Constitution, as the appointed means, by which the fabric of political society for mankind is, in coming ages, to gain new forms, new principles, new utility, and new life.

What, then, is a Constitution? Simply, the law of the law of a nation. It is that supreme law, which the nation itself makes, as the condition and the limitation of all the powers it will thereafter impart to its political servants. It is the guide which it gives to them all. It is the expression of the deliberate determination of the whole people, that the rights which it believes to lie at the foundation of all right, shall ever be preserved; that certain principles, which are to be as the life and essence of all law, shall ever be maintained; and it divides and defines, and yet connects by correlation, all the organic powers and functions of the State. And when the Constitution is thus formed, it is thereafter the supreme law of every citizen of the State, be he high or low, be it his office to make, to execute, or to judge of law, or only to assist in laying these duties upon others. To every man, and to every man alike, it is a supreme law.

Where does any thing like this exist except with

us? The imperfect imitations of it on the continent of Europe, and on this continent south of the Union, were never the expression or the creation of the deliberate reason and will of the people; they never were what Constitutions should be, and nearly all of them have been torn into tatters.

We often read of the British Constitution. The accurate Blackstone uses this phrase many times. But what does it mean, and what does it include? No man can certainly say, and probably no two men would answer this question in precisely the same way. It may mean the whole mass of the principles and rules which the Parliament and people of Great Britain regard as of the greatest importance. More than this it cannot mean. Let us suppose that at the next session of the British Parliament, a rigorous censorship of the press is established, the Queen authorized to lay what taxes she will on whom she will, and collect them as she will, the Habeas Corpus Act repealed, and all the ministers supplied with blank warrants under the privy seal, which they may fill with any name, and by these means imprison any persons at their pleasure. And let us suppose that these laws pass through Parliament with precisely the same forms as those necessary for a statute to regulate the days of grace on bills of exchange, or to provide any other common mercantile or municipal measure. It is certain that no man in England would have a legal right to resist any one of these laws; and no court or

magistrate in England would have a legal right to obstruct, or defeat, or annul them, or do any other thing than carry them at once into full force and effect. Of course, if the popular sentiment were not greatly changed, there would be opposition and effectual resistance somewhere. But it would be the opposition of rebellion or revolution, and not of legal right. But let any such law be passed by Congress and the President of the United States, or by the Legislature and Governor of any State, and it is only *nothing*. It is dead at its birth. The judicial body of the nation or the State is ready to declare it to be nothing. And the reason for all this is, that the law opposes the Constitution, and by the force of that fact, is nothing.

Two hundred and fifty years ago Lord Coke declared, that "when an act of Parliament is against common law, right, and reason . . . the common law will control it and adjudge it to be void." Afterwards, Lord Holt and Lord Hobart used similar or commendatory language. These great men were English Chief Justices; and it may seem a strange thing for me to say, that this doctrine of theirs was wholly false, and they knew it. Chancellor Kent, indeed, although he praises "the intrepidity and powerful sense of justice of these great judges," admits that there was no foundation whatever for their doctrine. He says, what every one acquainted with English law must know, that the will of Parliament is the supreme law of England. Dwarria, in his Treatise on Statutes, says: "Of Par-

liament, . . . the power and jurisdiction are so transcendent, that it cannot be confined, either for causes or persons, within any bounds. It has sovereign and uncontrollable authority in making laws concerning matters of all possible denominations."

If, in England, the word Constitution may mean the whole complex of all their political and legal institutions, here it means something distinct from them all, something sovereign over them all, imparting life to all of them that live, and denying life and power to whatever opposes it.*

* We hear much of the English Constitution; and as I do not wish to dispute about the meaning of words, I am willing to admit, that, in one sense of the word, England has a Constitution. But, if this means only the prevailing forms or principles of government, every State has a Constitution. If it means more than this, it should mean that these forms and principles are inviolable and beyond the reach of change through the usual organs and methods of legislation. But, in this sense, England certainly has not a Constitution.

If there be an English Constitution, what is it, and where is it to be found? Brande, referring to Hallam, says, "The constitutional law of this country, whatever it may have been in practice, was first declared by Statute 15 Edward 2, &c." Compare this with the famous declaration of Chatham: "I have been bred up in these principles, and know when the liberty of the subject is invaded and all redress is denied him, resistance is justified. If I had a doubt upon the matter, I should follow the example set us by the most Reverend Bench, with whom I believe it is a maxim, when any doubt in point of faith arises, to appeal at once to the source and evidence of our religion. I mean the Holy Bible. The Constitution

You may admit that we alone have a Constitution, and that I have shown accurately an important advan-

has its political Bible, by which, if it be fairly consulted, every political question may and ought to be determined. Magna Charta, the Bill of Rights, and the Petition of Rights, form that Code, which I call the Bible of the English Constitution." I cannot understand this as meaning practically any other thing, than that an English subject is justified in resisting a law which departs from the provisions or principles of the three instruments enumerated. But can this mean any thing else, than that the right of revolution would then exist?

Macaulay says, "Other societies possess written Constitutions more symmetrical. But no other society has as yet succeeded in uniting revolution with prescription, progress with stability, the energy of youth with the majesty of immemorial antiquity." I could more admire the rhetoric of this passage, if I were sure of its meaning. I suppose, however, that Macaulay intends to assert that the English government is older than ours, and that this greater age is an advantage which more than compensates the having ours *in writing*, or the formation of it by the people through agents chosen for that purpose, and their solemn acceptance and confirmation of it.

It is precisely on this point that I differ totally, not only from him but probably from all the admirers of what is called the British (or English) Constitution. And let me here strengthen my position by the high authority, the very high authority, as I think it, of Chief Justice Marshall; whose character, whose fame, and whose words I hold in profound reverence. In *Marbury's case*, he says: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected," and adds that a denial of the judicial power and duty to declare null a law which opposes the Constitution, "re-

tage we may derive from it ; and still you may ask me if this justifies the whole of my encomium. My answer is, that I have but begun to speak of all that our Constitutions may do for us. Nor can I go much further in this exhaustless series. A Constitution would be of great use, if only in bringing before the contemplation of the community, those fundamental principles which are constant, essential, permanent, and universal ; and in teaching the discrimination between them, and the more specific laws and rules which may safely be left to the experience and the expediency of each day.

More than this it does, when it gives us a sense of stability amid the changes and fluctuation of our law. And still more, when it bids us hope through all the uproar and peril of those political tempests, from which no State, no people, and no government, were ever wholly free.

But above all this, there is still more.

It has recently been said in Europe, and by some distinguished persons, that the present exigency of this country only reveals where our great and abiding danger really lies. It is, say they, in the total and necessary want of loyalty. For, they argue, there must be in all permanent government, either a central physical force which cannot be overcome, or a central moral force, strong enough to resist those assaults of

duces to nothing what we have deemed *the greatest improvement of political institutions* — A WRITTEN CONSTITUTION."

passion, interest, or ambition, intensified by folly and embittered by hatred, to which all government must sometimes be exposed. This physical force, it is said, they have not in America; nor have they that potent moral force; for that is no other than loyalty, which is there simply an impossibility.

So reason they, who are now watching, as they think, the convulsive steps of our downfall. And they reason aright, so far as their argument is concerned. Grant them their premises, and their conclusion is inevitable. If there be, if there can be, no loyalty in the citizens of the United States, there is, and there can be, no safety; and the wisest man is he, who first dismisses all hope.

But, must we make this admission? Is it true that we, the citizens of this great nation, have not and cannot have any real and powerful sentiment of loyalty?

The word "loyal" is but the English form, through the Norman French, of the Latin word "legalis." The feudal vassal knelt before his feudal lord, and pressing his hands together placed them within the hands of his lord, and swore to be "his man," — "fidelis et legalis," — "foyall et loyall," says old Littleton; "faithful and loyall." There can be no mistake about the meaning of this. The vassal swore to render to his lord, in good faith, all the duty and service, to which his lord was entitled, *by law*.

Undoubtedly the original meaning of this word, in

this connection, was only personal; it expressed an obligation from a man to a man. And this has always remained its principal meaning; but by no means its only or exclusive meaning.

They who believe in Providence, and therefore in the progress of mankind through all the modes and means of discipline and culture which have been provided for our race, may perhaps infer from the indistinct records of the beginning of history, that this discipline was then applied through the patriarchal relation, in which the sentiment of obedience was grounded upon the remembrance of infantile weakness and dependence, and of all the tenderness of the filial and paternal relation. Then, more certainly, for a long succession of ages, over nearly the whole world, and in a vast variety of shapes, it took the form of monarchy, or of personal and irresistible power. At length, in Europe, after the passing ages had done their work, and Christianity also had exerted its ameliorating influences, the Feudal System arose.

Knowing, as we do, the enormous abuses of this system, it may not be easy for us to acknowledge the important advance made by it over all that had preceded it, in the mere fact that it took the sovereignty from those who had only *power*, and transferred it to those who had *rights*. The feudal system, in theory, and to a great extent, in fact, divided all men into classes, which stood in definite relations to each

other. Of these classes, all had rights; and, as correlative to these rights, upon all of them, lay certain duties. And thus the debt of obedience, which formerly was paid only to him who had the power to enforce it, was now rendered to him who had the right to demand it. Perhaps the gain which the nations made, by the feudal system, may be expressed by saying, that before it, men possessed rights because they possessed power; but by it, and after it, they possessed power because they possessed rights. This gain was much; it was much, if only because it was a preparation for the next step; for the upward step to that elevation, on which he who stands is in possession of himself; the step to that place, which demands of him faith and loyalty to the right and to the truth, as they are embodied in the law which he has had a full and fair opportunity of contributing his share towards moulding into such a form, that it may be the representative of the common sentiment and prevailing view of truth and reason and justice.

I cannot believe that you will go with me in this brief reference to the past, nor in my belief that the future progress of the world will date from the era of Constitutions as that of its greatest epoch, unless you are prepared to assent, when I say that whatever may be the worth of liberty,—and no human reason or imagination can measure its whole value,—yet, the crowning glory of manhood is, obedience; perfect obedience to right; self-imposed and self-sustained

obedience to those truths and principles, which the Author of all right gives to man for his guidance.

Truth in action, is law. It may not always bear the name nor the shape of law; but it is that law, of which it has been said with the eloquence of truth, that "its seat is the bosom of God, and its voice the harmony of the world."

Can men be loyal to the Constitution and the Law?

No, if a feeling which has great power among us gains the ascendant; the opinion and the feeling that liberty is good only because it leaves the man to his unfettered inclinations, to his wild whims, and wilder passions, and confers upon him the unquestioned right of self-indulgence and self-degradation.

Yes, if this feeling is overcome by that other, which I verily believe to be also strong among us, and to be — perhaps slowly — gaining strength, — that liberty is given to us, not as an end, but as a means; that it is a gift of inestimable value, because it may be a means of immeasurable good, — the means of the culture of the best principles of our nature, and of the elevation of the whole man.

No, if we rejoice in our power over the Constitution and the Law, as over the work of our own hands, which it is as easy to destroy as to make; and if we look upon the Constitution as a trivial thing, which we will rend in pieces whenever its gentle guidance becomes a troublesome restraint, or cheat and elude it if we like that way of disposing of it better.

Yes, if we acknowledge in the Constitution and the law, the gift of Providence, given and constructed through our own agency; to be carefully amended when we can be sure that we see how to make it more conformable to truth, and more promotive of equal justice; but to be always loved and revered as, for the people of the whole country, the embodiment of public truth and public justice.

History, because it shows that with all the races of mankind the sentiment of obedience to constituted authority has been strengthened by the embodiment of this authority in persons, who were not responsible to the subjects of government for the exercise of their power, may be regarded as testifying that human nature demands that this sentiment should have this confirmation and support. This has been true; but I hold it to be true no longer, for the very reason that a great nation is now permitted to test the force of this sentiment without this aid.

Few things has history to tell, more touching, than the displays of loyalty to the sovereign, which have been called forth by his sufferings and his perils. These pictures are ineffaceably painted upon the records of the past, for the instruction of all ages, that choose, by the help of history, to retrace the steps of the pilgrimage of mankind. There they stand, to be equalled, and more than equalled, if not by us, then by our children, or, it may be, in some far distant age, by some far wiser generation, in the tales which

history shall then record, of devoted and self-sacrificing loyalty to the Constitution and the Law.

Possibly it may seem to you that I am forgetting the value of liberty; that I am hoping only that there will grow up among men a new slavery; a servile worship of a new master. You may say, let the Constitution and the law be what they may, there must still be a higher authority; and when the law of God and the dictates of conscience come into antagonism with human law, it is this last which must give way.

This is that question of "the higher law" which has recently been brought into so much prominence. That it may sometimes present a considerable difficulty, is certain; but, in my judgment, it is not a peculiar difficulty, nor, usually, a very great one.

Not peculiar; because it is one of those which are so common, that it may almost be said that human experience is composed of them. That this life may afford the intellectual and moral discipline and improvement for which we live, almost every day brings to almost every thoughtful person, the necessity of choosing between apparently discordant principles,—or, if we can, reconciling them in our action. For this, there must be an effort which is not always easy, nor does it always seem to be successful. Whether we shall obey the law, the principle, the suggestion, the impulse, which tells us to adopt a certain course of conduct, or that other which gives us just the opposite command, we know not, until we have sought

the answer, through careful and earnest thought, and, it may be, pain of mind and of heart. So be it, if through these efforts, that experience, and that pain, our understanding has been invigorated and enlightened, and our moral nature cleansed and strengthened. So be it, if we can escape all this, only by exchanging it for the unerring and undoubting instinct of the animal, which never doubts because it can never learn, and never knows its own weakness because it can never become wiser. There are men, who think thus, and only thus; and in their certain self-sufficiency, despise the imbecility which must stop to think, to reason, and to qualify. But are these men found to be the wisest in their conclusions or their actions? Are they the safest guides for the community?

The difficulty presented by this question of appeal from the Constitution and the law of the land to a "higher law" has always seemed to me much more a moral difficulty than an intellectual one. Or, if this phrase needs explanation, I should say that the perplexity becomes important and painful not so often because the understanding finds it difficult to see what is right, as because the affections find it difficult to choose what is right, and compel the acquiescence of opposing passions and proclivities.

For if any one brings to this question an honest acknowledgment of the authority of the Constitution and the Law, a disposition to obey them if he can and

so far as he can, and to obey them in the good faith and honesty which would come from a strong and practical sense of public duty,—he will seldom find his uncertainties profound, or permanent, or afflictive. They may terminate in a conviction that he cannot obey a law, because it seems to him to require a sin; but he will not regard it as his duty or his right to attack the whole structure of the Constitution, or to intimidate by vituperation and calumny all who differ from him. But if he, in actual fact, accepts the law only so far as he can subordinate it to himself, to his personal inclinations, to his pride of opinion, to the vain glory which rejoices in some cheap and well-paid martyrdom, to the stubborn self-esteem which consecrates every sentiment that it has once asserted, or to the policy which finds in loud hostility to offensive law a useful instrument,—then his difficulty will be great in proportion to the strength of whatever just convictions of right or of duty he may still have, for they must all be silenced or suppressed.

The right of appeal to “the higher law” is indeed a right of revolution; of rebellion. Its existence cannot be denied, but its definition is impossible.

It has always seemed to me, that this right was analogous to another, of which I should not speak, if I did not hope that you would do me the justice to believe that nothing could induce me to disturb the unbroken silence of these halls, upon all topics of partisan politics. Whenever I may use one of its

words, you may be sure that I shall endeavor to speak of it as I should have spoken, had that word never been heard as a war-cry.

The right of appeal to the higher law, seems then, to my mind, extremely analogous to the right of secession.

This right of secession, considered with as little reference as possible to the existing circumstances which have given it, at this moment, a painful prominence, might be founded on either of three grounds.

One, express recognition by the Constitution; but this certainly does not exist.

Another, the express reservation by the States, as they entered into the Union, of the right to leave it at pleasure. This reservation certainly was not made; and so far as there was any attempt at it, this attempt was defeated and withdrawn.

The third ground, and the only one upon which much stress is laid, is, that it is a reasonable inference from the antecedents, the history, the language, the provisions, the purpose, and the character of our national Constitution.

On this point, there may be some room for argument. But, after much endeavor, I find it impossible to exhibit this argument, or the argument in reply, so briefly as to bring them within what remains of the time which can be given to this lecture, and yet intelligibly, or with the fulness due to the extreme importance of the subject. I must, for the present

at least, content myself with saying, that the argument that we are not so much a confederacy as a union, and that our country is a nation, seems to me the stronger and the better.

Indeed, what year has passed since the adoption of our Constitution, which has not, by the whole character of our legislation and of the relations we have assumed with other States, declared and proved that we considered ourselves a nation, and that we were a nation? Is it, for example, possible, is it conceivable, that any one should have thought of paying to Spain a hundred millions for Cuba, if it were a part of the contract that, as soon as our money was paid and Cuba received into the Union, she might, at her own pleasure, "secede" and take her place among the nations, in her own way? The same remark would apply to our large payments for Louisiana, for Texas, and for Florida. And if we are a nation, how is it possible for a right of secession to exist, excepting as a right of revolution?

That it exists as a right of revolution cannot be denied. But of this, it might be enough to say, that while its existence must be admitted, neither its justifying causes, its extent, or its proper method of action, are capable of definition beforehand. There remains, however, something else to be said, which cannot be uttered nor contemplated without pain.

The right of revolution, if from the very necessity of human nature, it must always exist as a reserved

right, must always imply, from the nature of all government, a right of resistance to revolution. In other words, this right of resistance to revolution must, by a perfectly irresistible necessity, be the inevitable correlative of the right of revolution.

But does it follow, that where these rights exist they must be called into exercise? Not so, with either of them. For always, until men are maddened for their ruin, neither of these rights will be exercised, until it is called forth by an overwhelming necessity. On the one hand, the right of revolution will not be exercised until the grievances complained of are certain, and are extreme, and revolution promises relief, and all other methods of relief are exhausted. And on the other hand, when revolution has begun, a good government—and no government is good which does not remember that it exists for the sake of the governed—will try, in good faith, all methods of removing difficulty, and calming disquiet, and correcting error, and winning confidence, and dissipating fear, all methods not involving its own dissolution or its own perversion, before it resorts to active and forcible resistance; and even then its active measures will be as gentle as they can be without being ineffectual.

We live in an hour in which the question whether we have or have not a government seems, not only to look us in the face, but to involve the very possibility of a constitutional government. I know not

what is to be the immediate termination of this conflict, however certain I may be of the ultimate result. I know not whether our ship of State is to go on her way rejoicing at the dangers she has passed, or has already struck upon the shoal on which she is to perish, that she may become the means of safety for those which are to follow along the stream of time. One nation teaches its lesson to the world, by its failure, its misery, and its early decay; another, by its prosperity and its long and happy life. How are we to teach our lesson?

We have existing among us a diversity, and indeed an unquestionable antagonism of interest, of sentiment, of opinion, and of habit, on a variety of subjects; some of them trivial, and some of the utmost importance. But no great danger need have come or would have come from either or all of these causes, were it not for another. The peril which now makes every reflecting man tremble comes, indeed, from a cause which some of our fathers foresaw, but against which they made no effort to guard us, and perhaps could make none. They have left it to the virtue and the wisdom of the people. Are these now, or will they become, sufficient to meet it? This great peril is, that as all power is in the gift of the people, and the people give this power, with all its advantages, to those who please the people, there grows up among us, by an inevitable necessity, the profession of politics. The statesman, too, may be ambitious; public

applause and admiration may be the very breath of his nostrils; but the fame he seeks is that of the benefactor of his race, and not that of the mere placeman of his day. We have statesmen among us; and we have politicians. The mere politician has taken up his profession as a business; he is to live, and to gain as much more than a mere living as he can, by pleasing the people. Now politicians always use, and must necessarily use, as their instruments, all those interests which stir the community to its depths. Politicians, like men of all other professions and pursuits, are rivals, excepting so far as they combine for mutual assistance. One succeeds at the cost of another, or by his help to be duly paid for. They all use the same instruments for the same purpose; and he succeeds best, who uses them with the most skill and force. In other words, the politician succeeds who knows best how to identify himself with some great interest, and excite, exasperate, and, I fear that I must add, delude the people, in respect to it. Therefore, while these great questions imperatively demand patient forbearance, careful examination, kind construction, and the wisdom of peace; and with a moderate degree of these, might still be difficult, but could not be dangerous, we have not these, but in their stead, we have mutual misapprehension, mutual accusation and crimination, and then embittered prejudice, and then hostility, and then hatred. Not one word should I have said of these things, had I supposed what I say

applicable to the present time only. But, can it ever be otherwise, even if the present storm blow over, until the people learn their danger and their duty?

I believe this lesson will be learned; gradually, perhaps slowly; but it will be learned. Thoughtful men, especially those whom professional pursuits or other circumstances invite to the consideration of the subject, will acquire just views of what a constitution should be and how it should be regarded; these views will gradually be diffused through the community; and after a time this great American invention will be understood in its whole nature and all its bearings, better than it can be now.*

* Of the many illustrations which might be given of the comparative ignorance of our fathers as to the working of their own Constitution, I select one relating to the judicial power.

The distinction between the executive, the legislative, and the judicial functions, is first spoken of, as far as I know, by Montesquieu, and in reference to the English form of government. It seems never to have occurred to ancient writers upon politics, and grew up in England as far as it exists there, from no definite design. Our fathers recognized it, and carefully provided for it, as the surest safeguard of political rights; for the obvious reason, that if the executive can make what laws he will, or construe and apply them as he will, there is an obvious despotism; and if any other body in the States can unite these functions, that body becomes a despotic executive. Of these bodies, nothing is now more universally admitted, than that it is the function of the judiciary to judge and decide whether a law be constitutional or not; and that it is not merely their certain right, but as certainly their duty to do so, when the question is properly before them.

In 1792 a pension law was passed, requiring the judges of the

The people will learn practically, that a wise selection of their political agents, and due care of their

Circuit Courts of the United States to carry the same into effect. The question soon came before many of these courts, whether this act was constitutional; and they all decided at once, that it was unconstitutional, because it imposed upon judges duties which were certainly not judicial. But the judges for the district of New York, — Jay, Cushing, and Duane, — while clear that the law was unconstitutional, held that “from their desire to manifest their high respect for the national legislature,” they would consider that the law had only appointed as commissioners the persons who happened then to be judges, inadvertently describing them by their *official* names instead of their *personal* names; and accordingly they undertook the duties of commissioners. The court for the district of Pennsylvania (Wilson, Blair, and Peters), and that for North Carolina (Iredell, and Sitgreaves), went so much further as to refuse to proceed under the act; but each court wrote a long letter to the President, apologizing almost humbly for their decision, the Pennsylvania court calling it “a painful occasion,” and the North Carolina court speaking of the “lamentable difference of opinion.” And so things went until 1808, when, in *Marbury’s* case before referred to, Chief Justice Marshall considered the question in all its bearings; and with a force and clearness which I cannot characterize otherwise than by calling them most admirable, settled the question, as I hope, for all time. What he considered this power of the judicial body can best be told in his own emphatic conclusion. “This is of the very essence of judicial duty.”

Very far are we, however, from understanding now the exact limitations of judicial duty in this respect; or, in general, the nature and force of what Jeremy Bentham called “judge-made law.” It may well be hoped that as the nation grows older it will grow wiser, and that some questions will hereafter be settled to which no certain answer can now be made. But already, I think, there are three rules on this subject which may be considered as established.

political interests, are as important to their welfare and to the comfort of every day, as a due attention to their business on the farm, or in the store, or the workshop, or the office. They will learn better how to discriminate between the statesman and the politician; and when men who live by their favor learn that it is given to the character and the qualities which fit a man for public usefulness, that character and those qualities will be more common. We may not expect a rapid advancement or ultimate perfection in public virtue, or public wisdom, but we may hope for continued and important improvement; and with every step of that improvement, our dangers will diminish and our peace and prosperity be more secure.

One, that the court cannot judicially inquire into any law, unless it be directly involved in some case properly brought before them by the parties in interest. (I have nothing to say here of instances in which a State Constitution authorizes the executive or legislature to ask the opinion of the judges.)

Secondly, if they consider any law or rule or principle, which is not so involved in the case before them that their consideration of it is necessary for their judgment, they go just so far beyond their judicial duty, and can utter no word of judicial power. They may make essays, or utter apothegms of much interest and value as the sayings of wise men. But what they say is not *judicial* any further than it is distinctly involved in their *judgment*, and therefore it is not authoritative. It may be a *saying* (dictum), but it is not a *decision*.

Thirdly, whatever they adjudge and determine within these limits, may be reversed or qualified by the same judges or their successors, or by the legislature if the Constitution permits, but, until so reversed or qualified, it has the whole force of law.

While most painfully impressed with a sense of the perils which have pressed upon the path through which our country has reached the present day, and those which still environ us, and those which project their dark shadows over our future, I am still very confident that we may pass through them; that we shall do more than transmit to other ages and races emphatic instruction as to what they must avoid. I hope, and I believe, that we, even we, may learn while it is yet day, how to use, how to value, how to defend, and how to be defended by, our Constitution.

Nor will I shrink from saying what further I believe, and shall believe as long as I can. It is, that the final issue of the present struggle, may prove to us, little as we are prepared for it, may prove to observing nations,—much as it may surprise them,—that we have at this moment the strongest government in the world. The number of its soldiers and the inventory of its materials of war do not form the only measure of the strength of a government. For government is an instrument for the promotion and security of the prosperity and happiness of a State. That instrument is the strongest which can best resist assault, and overcome disturbing influences, and do its appointed work in despite of hinderance and obstacle. We have now about one fifth of our country in declared and organized revolt, and about another fifth in suspense, and important differences of sentiment in

the remainder. But I verily believe that this government will pass through this tremendous peril, with less injury, will reach a better result, and reach it with less cost of life and happiness, than would be possible for any other existing government.

For it is the government of law, and its strength is in the Constitution. We are, as I have said, a nation that includes as wide a diversity of opinion, of sentiment, of character, and of interest, as of soil and clime. But over us all the Constitution bends like the universal sky, holding us all within its embrace, but lifted up too high for any one to reach it with a sacrilegious hand. I may pursue this fancy further. I may tell you that like the sky, it comes down as the beneficent air, which surrounds us at every step and at every moment, supplying us with the element of political life, and yet so soft, so yielding and invisible, that we do not think of it as we engage in the work or enjoy the happiness of every day. Soft, yielding, and invisible is this sweet air we breathe and live upon; and yet it may, when there is need, put forth its strength,—and who can stand against the might of the unfettered wind!

The strength of our Constitutional government must reside in its gentleness, and in the opportunity which is given by its gentleness, for passion to calm down, and stubbornness to melt away, and the wanderer to return, and that which is right and best to become manifest to all men. It must reside in its

patient forbearance while that is possible, and in its cautious mildness as far as that is possible; in its power, derived from this very gentleness, of exquisite adaptedness to every exigency; and, therefore, of adequacy to any exigency which may call upon it, either to bring into action its whole irresistible might, or to take any other course, which a comprehensive and clear-sighted wisdom may approve.

Therefore I still believe, for all that has come, for all that is and all that threatens, I believe that our constitutional government is strong. Stronger than the North or the South, or the East or the West. Stronger than angry, unreasoning, reckless fanaticism of any name, pretence, or place. Stronger than folly or wickedness in any of the forms in which they are now abroad among us, active in the work of destruction. Strong enough to bear onward its inestimable blessings, through a long, long future.





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